No. 83-1420

In the Supreme Court of the United States

OCTOBER TERM, 1983

ABRAHAM A. GAMMAL, PETITIONER

v.

JAMES HAMROCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner, whose discharge from his position with the Department of Housing and Urban Development (HUD) was upheld in previous litigation, seeks damages from his supervisors in their individual capacities for various alleged constitutional violations and relief from the government for an alleged "de facto reduction in rank" that preceded his dismissal.

1. Petitioner was a GS-13 maintenance engineer in the Boston Area Office of HUD. From 1974 until 1978, he engaged in several protracted controversies with his superiors concerning whether he had supervisory authority over other maintenance engineers and other issues involving the organization of the office. During this period, various disciplinary sanctions were imposed on petitioner, including a brief suspension and the withholding of a regularly scheduled pay increase. These sanctions were upheld on administrative appeals. Pet. App. B2-B6.

In 1978, as a result of a reorganization, petitioner was advised that his position would be abolished. He was offered a position in Washington, D.C. When he declined to accept that position, he was scheduled for dismissal. The Civil Service Commission (CSC) upheld petitioner's administrative appeal from this action, however, ruling that his removal was in retaliation for a complaint he had made about waste and mismanagement in the agency. The CSC ordered that petitioner be reinstated. Pet. App. B7, C2.[1]

Petitioner was then offered a different GS-13 position in Boston. When petitioner refused to accept the new position and did not report for duty, HUD obtained an administrative determination that the offer satisfied the CSC remedial order. HUD then informed petitioner that if he did not report he would be considered absent without leave and could be terminated. Pet. App. C2-C3. "[A]fter more than seven months, during which [HUD] delayed the imposition of sanctions and urged compliance several times, [HUD] completed the removal proceedings" (*ibid.*). Petitioner challenged this removal decision, but the Merit Systems Protection Board (MSPB) upheld the agency's action (see note 1), and the court of appeals affirmed the MSPB's decision (Pet. App. C1-C6; *Gammal* v. *MSPB*, 671 F.2d 654 (1st Cir. 1982)). Petitioner did not seek further review.

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[1]Before Congress enacted the Civil Service Reform Act of 1978, adverse personnel actions could generally be appealed to the Civil Service Commission's Federal Employee Appeals Authority. An employee could seek review of a decision by the Authority by filing suit in United States district court or in the Court of Claims. See *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 20. Under the Civil Service Reform Act, adverse actions in disciplinary cases are appealable to the Merit Systems Protection Board (MSPB); MSPB decisions may be reviewed by filing a petition for review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7701 and 7703. Before 1982, a petition for review of an MSPB decision could be filed in any appropriate court of appeals. 5 U.S.C. (1976 ed. Supp. V) 7703.

2. In the meantime, petitioner had filed this action in the United States District Court for the District of Massachusetts. Count I of the complaint sought correction of records and back pay for an alleged "de facto reduction in rank" that occurred before petitioner's removal. The essence of this claim was that petitioner was denied supervisory duties that he considered to be part of his job. See Complaint para. 24. Petitioner had presented his claim of a "de facto reduction in rank" to the CSC and had been denied relief. Pet. App. A3, B9; see Pet. 4.[2] Count II of the complaint sought money damages for alleged constitutional violations from respondents, who were petitioner's civil service superiors, in their personal capacities. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The district court stayed proceedings on this complaint pending the disposition of petitioner's efforts to obtain review of the MSPB decision (see Pet. App. C6). After the court of appeals ruled against petitioner in that proceeding, a magistrate dismissed the complaint (*id.* at B1-B12).[3] The magistrate ruled that Count I had been rendered moot by the court of appeals' decision upholding petitioner's removal for being absent without leave. The magistrate concluded in addition that summary judgment was appropriate because petitioner had failed to offer sufficient evidence to draw into question the administrative decisions rejecting his claims. *Id.* at B10-B11. The magistrate granted summary judgment against petitioner on Count II as well (*id.* at

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[2]Petitioner also originally alleged a conspiracy to deprive him of his constitutional rights, in violation of 42 U.S.C. (Supp. V) 1985(1). The district court dismissed that claim because it found "no indication that any evidence could be produced to substantiate" it (Pet. App. B11), and petitioner has not pursued it.

[3]The case was heard by a magistrate pursuant to 28 U.S.C. 636(c).

B11-B12), holding that respondents were immune from personal damages liability under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The court of appeals affirmed (Pet. App. A2-A5; 725 F.2d 664). It ruled that Count I was moot and that Count II was barred by *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), which held that a federal employee may not bring a *Bivens* action against a superior on the basis of claims that are addressed by the civil service remedies provided by Congress.

3. The decisions of the courts below are plainly correct. The Count I claim challenging a "de facto reduction in rank" became moot when it was finally determined that HUD had remedied petitioner's dismissal by offering him a different position and was not required to reestablish petitioner's previous position. Petitioner fails to identify any relief that can now be given that would remedy the alleged "de facto reduction in rank," even if his claim in Count I were sustained. In particular, since the position to which this claim relates has been abolished, and petitioner has been lawfully discharged from government service, the responsibilities of which he was allegedly divested cannot be restored to him.

Although petitioner asserts (*e.g.*, Pet. 4) that he seeks back pay, he does not explain why back pay is an appropriate remedy for a "de facto reduction in rank" that apparently did not affect petitioner's compensation. In any event, petitioner identifies no statute that would waive sovereign immunity and authorize the government to pay money damages for a wrongful "de facto reduction in rank." Petitioner also seeks correction of records, but he suggests no reason to believe that the allegedly wrongful action is reflected in any records. Indeed, petitioner's point in denominating it a "de facto" reduction in rank appears to be precisely that it is not reflected in any official records (see,

e.g., Pet. 6-7), and the complaint (paras. 24, 26) repeatedly states that the "de facto reduction in rank" was *not* effected through any formal or official personnel action.[4]

Count II is plainly barred by *Bush* v. *Lucas*. Petitioner had an opportunity to invoke, and did invoke, the elaborate remedial mechanism provided by Congress for federal employees. Indeed, that remedial scheme provided him with complete relief for his removal, but he failed to take advantage of the offer of reinstatement. Contrary to petitioner's assertion, he is in fact now "in the same position he would have been in had the unjustified or erroneous personnel action not taken place" (Pet. 9 (quoting *Bush*, slip op. 21)); he has been lawfully discharged because, subsequent to the events that are the subject of the complaint, he was absent without leave.

Petitioner's attempts to distinguish *Bush* are obviously unavailing. Nothing in the language or logic of the opinion in *Bush* suggests that the Court's holding turned on the fact that it involved a First Amendment claim (see Pet. 10) or on a perception that the civil service employee's actions were "motivated by selfish rather than altruistic reasons" (*ibid.*). Petitioner suggests that *Bush* does not control his *Bivens* claim to the extent that that claim rests on the alleged "de facto reduction in rank" because he did not receive an

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[4]Petitioner relies (Pet. 6-7) on *Fucik* v. *United States*, 655 F.2d 1089 (Ct. Cl. 1981), *Hurley* v. *United States*, 575 F.2d 792 (10th Cir. 1978), and *Pauley* v. *United States*, 419 F.2d 1061 (7th Cir. 1969). Those cases address the question whether and under what circumstances a reduction in rank might be said to have occurred even if an employee's grade was not reduced. But in none of those cases had the employees seeking relief been lawfully discharged for reasons independent of the allegedly wrongful reduction in rank; thus, some form of relief remained available to them. Petitioner, by contrast, has been lawfully dismissed for independent reasons, and no relief remains available to him at this point.

administrative hearing on that claim (see Pet. 8-9). But petitioner acknowledges (*id.* at 4) that he was able to present this claim to the CSC; whether the CSC was justified in not holding a hearing is no longer material because, as we have explained, the claim is now moot. The fact that the claim became moot before review of the CSC decision was completed does not mean that the remedy prescribed by Congress is inadequate; it is a feature of many remedial schemes that claims will sometimes become moot before all appeals are exhausted.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

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[5]We note that in *Carroll* v. *United States*, 707 F.2d 836 (5th Cir.), modified on reh'g, 721 F.2d 155 (1983), petition for cert. pending, No. 83-1539, cited by petitioner (Pet. 9), the court of appeals granted rehearing and affirmed the dismissal of the complaint on the authority of *Bush*.

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